The issue before the court is whether the bringing into retrospective effect of certain provisions of the law involved could have effect on a party's rights or obligations. This court is of the view that the law cannot be made retrospective to deprive the rights of a party that were legally enshrined by the relevant law at that point of time. It is most unfair to resort to retrospective enactments just to avoid a party's legal obligations. See *Re Athlumney*[1] where at pp 551 and 552, Wright J said: 'Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation ...'.

A retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless the language is very clear and capable of only one meaning, in that it is retrospective. See *Re Chapman*[2] and *Pardo* v *Bingham*.[3]

Clearly the amendments in our case were retrospective, that is without question.

But nowhere is there clear provision in the amendment Act making it retrospective the taking away of an existing right or abolishing an existing obligation. Surely if the legislature had intended to take away an existing right or obligation it would have clearly so stated in the amendment itself.

In the circumstances, the appeal by the plaintiff bank against the decisions of the SAR is allowed, for the amounts which the defendant had guaranteed in the letters of guarantee in favour of the two companies, Camlin NS Sdn Bhd and Syarikat Gula NS Sdn Bhd, as prayed for in the two applications of the plaintiff bank with costs.

*Appeal allowed.*

Solicitors: *Allen & Gledhill*; *Ismail Brothers.*

Reported by *Ng Sheau Jiuan*

# Malaysia Credit Finance Bhd v Yap Hock Choon & Anor

HIGH COURT (IPOH) – ORIGINATING SUMMONS NO 31-13-86
ABDUL MALEK J
12 NOVEMBER 1988

*Land Law – Application for foreclosed property to be sold by private treaty by plaintiff bank – Defendant found purchaser for a price less than reserve price – Whether sale by private treaty to plaintiff's valuers' purchaser at higher price a collusive sale – Whether non-disclosure of valuers' purchaser to defendant amounted to bad faith – Whether auction at higher reserve price should be ordered*

The plaintiff had taken out foreclosure proceedings against the defendants as regards a piece of property charged by the defendants to the plaintiff. The order for sale was granted and the first auction was fixed with a reserve price of $350,000. Due to objections by the defendants, a second auction was subsequently fixed with a revised reserve price of $400,000 but there were no bidders. The plaintiff now applies for the property to be sold by private treaty at a reserve price of $345,000. This was strongly objected to by the first defendant who contended that the sale by private treaty to the plaintiff's valuers' purchaser at $345,000 would be a collusive sale as the plaintiff did not inform him of its purchaser when he had actually got a purchaser for $330,000. The defendants alleged that the non-disclosure of the valuers' purchaser amounted to bad faith and another auction with a reserve price of $375,000 should be held.

**Held,** allowing the plaintiff's application:

Having considered the facts and perused the documents, the proposed sale to the plaintiff's valuers' purchaser at $345,000 cannot be considered to be collusive as the price was in fact higher than that offered by the defendant's purchaser. Furthermore, the defendants had also consented to this price earlier on. Taking into account all the circumstances, inter alia, the present state of the economy, the fact that order for sale was made almost two years ago and that any delay would only add to the amount due, an order for another public auction with a reserve price of $375,000 shall not be granted.

[*Editorial Note*: The second defendant has appealed to the Supreme Court vide Civil Appeal No 462 of 1988.]

*Poh Chee Seng* for the plaintiff.
*Thayub Khan* (Assistant Official Assignee) for the Official Assignee for the first defendant.
*Teresita Antoinette* for the second defendant.

*Cur Adv Vult*

**Abdul Malek J:** The plaintiff had taken out foreclosure proceedings against the defendants as regards the land held under Certificate of Title No 30924 for Lot No 65195 in the Town of Ipoh (hereinafter 'the said property') which had been charged by the defendants as registered proprietors to the plaintiff to obtain a term loan facility advanced to the first defendant to the limit of $360,000 with interest at 16% pa on monthly rests.

The order for sale was granted on 7 November 1986 and the latest supplementary affidavit on the amount due

stated a sum of $458,512.19 as at 12 May 1986. The first auction was fixed on 12 December 1987 with a reserve price of $350,000 but on 3 December 1987 the defendants filed a summons-in-chambers applying for that auction to be postponed as the defendants were unhappy with the reserve price which had been fixed by the learned senior assistant registrar. The second auction was subsequently fixed on 9 April 1988 with a revised reserve price of $400,000 but there were no bidders.

By a summons-in-chambers filed on 14 June 1988, the plaintiff applied for the said property to be sold by private treaty at a reserve price of $345,000. This was strongly objected to by the first defendant (who incidentally had been adjudicated a bankrupt on 17 March 1986), who swore several affidavits to this effect on his own behalf and on behalf of his wife, the second defendant, stating that they had actually got a purchaser for $330,000 in late April 1988 and had informed the plaintiff's valuers about it who had chosen not to inform them of the $345,000 purchaser that they had at the same time. In the event, the defendants alleged that the non-disclosure of the valuers' purchaser amounted to bad faith which had the effect of making the sale by private treaty to the plaintiff's purchaser a collusive sale. As such, they preferred that another public auction be held with a lowered reserve price of $375,000.

Learned counsel for the plaintiff submitted that all these allegations had taken place in April 1988 whereas the defendants had consented by letter dated 18 June 1988 to the reserve price of $345,000. It was because of this consent that they had made this application for the sale by private treaty at that price.

Having considered the facts and perused the documents, I came to the conclusion that the proposed sale to the plaintiff's valuers' purchaser at $345,000 cannot be considered to be collusive as the price was in fact higher than that offered by the defendant's purchaser. I may have held otherwise if it was lower. Furthermore, the defendants had also consented to this price in June 1988.

I was against the idea of ordering another public auction with a lowered reserve price of $375,000 in view of the present state of the economy, the fact that any delay would only add on to the amount due, the fact that the order for sale was made almost two years ago, the fact that there were no bidders at the 9 April 1988 auction with the reserve price of $400,000, the fact that the defendants despite objecting to the reserve price of $350,000 at the cancelled 3 December 1987 auction had in June 1988 agreed to the $345,000 reserve price and were quite prepared to sell it to their purchaser for a price below that, namely, $330,000 and as stated earlier, the fact that the plaintiff had already got a purchaser who was willing to pay $15,000 more than the defendants' purchaser.

In the circumstances, I granted the order in terms of the plaintiff's application.

*Application allowed.*

Solicitors: *Chong, Poh & Lim; Almeida & Co.*

Reported by *Ng Sheau Jiuan*

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## Sugumar Balakrishnan v Chief Minister of State of Sabah & Anor

HIGH COURT (KOTA KINABALU) – ORIGINATING SUMMONS NO 64 OF 1988
MOHAMED NOOR J
7 NOVEMBER 1988

*Administrative Law – Declaration and certiorari – Whether mutually exclusive remedies – Case authorities based on post-1977 UK O 53 cannot be followed – Availability of certiorari cannot debar applicant from seeking declaration instead – Rules of the High Court 1980, O 15 r 16, O 53 r 1*

*Civil Procedure – Declaration and certiorari – Whether mutually exclusive remedies – Applicant failed to apply for leave for order of certiorari within prescribed time under O 53 r 1 of Rules of the High Court 1980 – Whether applicant precluded from seeking declaratory relief – Case authorities based on post-1977 UK O 53 cannot be followed – Rules of the High Court 1980, O 15 r 16, O 53 r 1*

The plaintiff was served with a notice from the office of the first defendant requiring him to show cause as to why the state authority should not publish in the federal gazette that the Immigration and Passport (Exemption) Order 1984 shall not apply to the plaintiff. The effect of such publication would be that the plaintiff can only enter Sabah by using a proper passport. Pursuant to such notice, the plaintiff filed a notice of motion for leave to issue the writ of prohibition. Leave was refused (see [1988] 3 MLJ 171) and the first defendant signed the notification under the Immigration and Passport (Exemption) (Non-Application) (Sabah) Order 1984 (the 'Non-Application of Exemption Order 1984'). Thereafter the plaintiff did not proceed by way of certiorari to quash and nullify the notification but instead applied for declaratory orders challenging the validity of the Non-Application of Exemption Order 1984 and the notification.

The first defendant now applied to the court for an order that the plaintiff's application be struck out under O 18 r 19 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court. The application was based on the ground that the plaintiff's application, though in the form of a declaration, in substance and effect was for an order of certiorari made without the necessary leave as required under O 53 r 1 and as such it was an abuse of the process of the court. The first defendant relied mainly on the two English cases of *O'Reilly* v *Mackman & Ors*[1] and *Cocks* v *Thanet District Council*.[2]